*UNITED STATES DISTRICT COURT*

*DISTRICT OF MAINE*

| | | |
|---|---|---|
| ***GEORGE CROCKER,*** | ***)*** | |
| | ***)*** | |
| ***Plaintiff*** | ***)*** | |
| | ***)*** | |
| ***v.*** | ***)*** | ***Docket No. 00-13-P-C*** |
| | ***)*** | |
| ***LEWISTON POLICE DEPARTMENT,*** | ***)*** | |
| ***et al.,*** | ***)*** | |
| | ***)*** | |
| ***Defendants*** | ***)*** | |

***MEMORANDUM DECISION ON MOTIONS TO STRIKE AND RECOMMENDED DECISION ON MOTIONS OF DEFENDANTS GAGNE AND LEWISTON POLICE DEPARTMENT FOR SUMMARY JUDGMENT AND MOTION OF PLAINTIFF FOR PARTIAL SUMMARY JUDGMENT***

The remaining defendants,[1] the Lewiston Police Department and Andre Gagne, a bail commissioner, move for summary judgment on all claims asserted against them in this action alleging violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq*., the Rehabilitation Act, 29 U.S.C. § 794, and the Maine Human Rights Act ("MHRA"), 5 M.R.S.A. § 4501 *et seq*. The plaintiff moves for partial summary judgment on his claims against these defendants, both of whom have also moved to strike the plaintiff's motion. I deny the motions to strike and recommend that the court grant the defendants' motions for summary judgment and deny the plaintiff's motion.

[1] The third named defendant, the Androscoggin County Sheriff's Department, was dismissed from this action by stipulation. Stipulation of Dismissal (Docket No. 11).

## I. Summary Judgment Standard

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant . . . . By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

The mere fact that both parties seek summary judgment does not render summary judgment inappropriate. 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* ("Wright, Miller & Kane") § 2720 at 327-28 (3d ed. 1998). For those issues subject to cross-motions for summary judgment, the court must draw all reasonable inferences against granting summary judgment

to determine whether there are genuine issues of material fact to be tried. *Continental Grain Co. v. Puerto Rico Maritime Shipping Auth.*, 972 F.2d 426, 429 (1st Cir. 1992). If there are any genuine issues of material fact, both motions must be denied as to the affected issue or issues of law; if not, one party is entitled to judgment as a matter of law. 10A Wright, Miller & Kane § 2720.

## II. Factual Background

The following undisputed material facts are appropriately presented by the parties.[2] On January 11, 1998 three officers of the Lewiston Police Department responded to a 911 call from Carol York. Affidavit of Timothy J. Morin ("Morin Aff.") (Docket No. 23) ¶¶ 2-3.[3] Morin received the dispatch call at approximately 4:55 a.m. *Id*. ¶ 10. The officers were sent to the scene by a dispatcher who had received the call and a report of an assault in progress. *Id*. ¶ 2. York identified the assailant as her boyfriend. *Id*. Several times during the call, the telephone that York was using was hung up. *Id*. Officer Scot Bradeen informed Morin upon their arrival at York's residence that he was familiar with the parties, having been dispatched to the residence on two recent occasions for domestic violence complaints. *Id*. ¶ 3. Bradeen also stated that York's boyfriend, the plaintiff, was deaf but that he had been able to communicate with the plaintiff on those previous occasions using gestures and hand signals. *Id*. At the residence, Bradeen communicated with the plaintiff while Morin spoke with York. *Id*.

[2] The plaintiff filed no response to the statements of material facts filed pursuant to this court's Local Rule 56 by defendants Gagne and the Lewiston Police Department. Accordingly, all facts contained in those statements, to the extent supported by record citations, are deemed admitted. Local Rule 56(e). The same is true with respect to the statement of material facts filed by the plaintiff in support of his motion to the extent that those facts affect the claims against defendant Gagne, who filed no response to that document. The plaintiff did file a document entitled Plaintiff's Reply Statement of Material Facts (Docket No. 38), which purports to "reply" to the Lewiston Police Department's denial of a factual assertion in one paragraph of his statement of material facts. Local Rule 56 makes no provision for a reply to anything other than additional factual assertions served by a party opposing summary judgment, and the Police Department's opposing statement of material facts did not include any additional factual statements. I will, therefore, not consider the factual assertions made in the plaintiff's "reply."

[3] Defendant Gagne's statement of material facts identifies the date as June 11, 1998. Defendant Andre Gagne's Statement of Material Facts (Docket No. 20) ¶ 1. The record material cited in support of this paragraph, the Morin affidavit, makes clear that the event actually took place on January 11, 1998.

Based on York's appearance and what she told him, as well as the dispatcher's statement that he could hear York being slapped and choked during the 911 call, Morin concluded that the plaintiff should be arrested and charged with domestic violence assault. *Id*. ¶¶ 4-5. At some point before he was transported to the jail, the plaintiff asked that Sgt. Mark Watson of the Lewiston Police Department be called to the scene to speak to him. Defendant Lewiston Police Department's Answers to Interrogatories Propounded by Plaintiff (Exh. C to Defendant Lewiston Police Department's Statement of Uncontroverted Facts in Support of Summary Judgment ("Lewiston SMF") (Docket No. 17) at Question 13. Watson is conversant in sign language, although he is not a certified interpreter, and he had assisted the plaintiff in communicating with Lewiston police in the past. *Id*. at Questions 20 & 23. Watson was not available at that time. *Id*. at Question 20.

Bradeen reported to Morin that the plaintiff had indicated to Bradeen that he had been watching a movie on television when York came home after drinking liquor and began yelling at him. Morin Aff. ¶ 6. The plaintiff told Bradeen that York would not leave him alone, and that he pushed her away several times when she approached him, until he slapped her once across the face with an open hand. *Id*. The plaintiff indicated that he did not punch or kick York. *Id*.

Morin arrested the plaintiff and transported him to the Androscoggin County Jail. *Id*. ¶ 7. When Morin attempted to advise the plaintiff why he had been arrested, the plaintiff appeared not to understand. *Id*. Morin then used pen and paper to write an explanation of domestic violence assault for the plaintiff. *Id*. Morin recognized the plaintiff as a regular patron of Morin's father's business, where Morin had seen the plaintiff use written notes and gestures to communicate with his father. *Id*. The plaintiff insisted on being provided with a pen and paper to write notes to Morin. *Id*. After both men had written notes and used gestures, Morin believed that the plaintiff understood why he had been arrested. *Id*.

The plaintiff then began to tell Morin about the incident at his residence. *Id*. Morin did not want the plaintiff to communicate any further information to him unless the plaintiff understood his Miranda rights. *Id*. ¶ 8. He gave the plaintiff a written Miranda warning form, which the plaintiff indicated was not clear to him. *Id*. Morin then wrote a more simplified version of the warnings and asked the plaintiff in writing to circle the word "yes" on the written form if he fully understood the rights that Morin had explained in writing. *Id*. The plaintiff indicated that he understood the rights and wanted to speak to Morin. *Id*. The information that the plaintiff then communicated reiterated what he had communicated to Bradeen. *Id*. ¶ 9. After receiving this information, Morin informed the plaintiff that he would issue a summons to York for domestic violence assault against the plaintiff. *Id*. Morin also advised the plaintiff that he would not be allowed to return to his residence upon his release on bail. *Id*. He also wrote a note to the plaintiff asking whether he had money to pay his bail and the plaintiff replied in writing that he had a twenty-four hour bank card. *Id*. ¶ 10.

Morin and the plaintiff arrived at the jail at approximately 5:25 a.m. and Morin left the jail at approximately 6:30 a.m. *Id*. The plaintiff never asked Morin to obtain the services of an interpreter nor did he ask Morin to obtain the services of Watson. *Id*. ¶ 11. Before Morin left, the plaintiff understood that he would have to make arrangements for bail before he could be released. Deposition of George Crocker ("Plaintiff's Dep.") at 43.

Defendant Gagne was contacted by a corrections officer from the jail on the morning of January 11, 1998. Affidavit of Andre Gagne ("Gagne Aff.") (Docket No. 21) ¶ 4. Based on the information provided by the officer, Gagne set bail for the plaintiff over the telephone. *Id*. Gagne was contacted again that night to come to the jail to release the plaintiff on bail. *Id*. Gagne met with the plaintiff at the jail for about ten minutes. *Id*. ¶ 5. He showed the plaintiff the bail bond and pointed to each of the conditions. *Id*. The plaintiff appeared to read each condition. *Id*. He did not indicate to

Gagne that he did not understand the written bail bond. *Id*. The plaintiff did not ask Gagne to provide him with an interpreter or any other auxiliary aid. *Id*. The plaintiff was released soon after meeting with Gagne. Plaintiff's Dep. at 57, 59.

The plaintiff is a "qualified individual with a disability" within the meaning of the ADA, and specifically 42 U.S.C. § 12131; the Rehabilitation Act, and specifically 29 U.S.C. § 794 and 28 C.F.R. § 42.540(1); and the MHRA, and specifically 5 M.R.S.A. § 4553(8-D). Statement of Undisputed Material Facts in Support of Plaintiff's Motion for Partial Summary Judgment ("Plaintiff's SMF") (Docket No. 25) ¶ 1; Defendant Lewiston Police Department's Opposing Statement of Material Facts ("Lewiston's Responsive SMF") (Docket No. 32) ¶ 1. The Lewiston Police Department is a "public entity" as defined in the ADA, at 42 U.S.C. § 12131(1), and a program or activity that receives federal financial assistance within the meaning of the Rehabilitation Act. *Id*. ¶¶ 2-3. At no time prior to or during the plaintiff's arrest did the Lewiston Police Department provide him with notice of the protections afforded under the ADA. *Id*. ¶ 7.

**III. Discussion**

The complaint alleges that the remaining defendants violated the Rehabilitation Act (Count I), the ADA (Count II) and the MHRA (Count III) and seeks injunctive relief, compensatory and punitive damages, civil penalties and attorney fees. Complaint (Docket No. 1) at 6-11. The relevant portion of the Rehabilitation Act provides:

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .
>
> * * *
>
> For the purposes of this section, the term "program or activity" means all of the operations of —
>
> **(1)(A)** a department, agency, special purpose district, or other instrumentality of a State . . . .

29 U.S.C. § 794(a) & (b). The relevant portions of the ADA provide:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132.

> As used in this subchapter:
> **(1) Public entity**
> The term "public entity" means —
> **(A)** any State or local government;
> **(B)** any department, agency, special purpose district, or other instrumentality of a State or States or local government . . . .

42 U.S.C. § 12131.

The relevant portion of the MHRA provides:

> It is unlawful public accommodations discrimination, in violation of this Act:
>
> **1. Denial of public accommodations.** For any public accommodation or any person who is the owner, lessor, lessee, proprietor, operator, manager, superintendent, agent or employee of any place of public accommodation to directly or indirectly refuse, discriminate against or in any manner withhold from or deny the full and equal enjoyment to any person, on account of . . . physical . . . disability . . . any of the accommodations, advantages, facilities, goods, services or privileges of public accommodation, or in any manner discriminate against any person in the price, terms or conditions upon which access to accommodation, advantages, facilities, goods, services and privileges may depend.
>
> For purposes of this subsection, unlawful discrimination also includes, but is not limited to:
>
> * * *
>
> **B.** A failure to make reasonable modifications in policies, practices or procedures, when modifications are necessary to afford the goods, services, facilities, privileges, advantages or accommodations to individuals with disabilities . . . .
>
> **C**. A failure to take steps that may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or

> otherwise treated differently than other individuals because of the absence of auxiliary aids and services . . . .
>
> * * *
>
> **E**. A qualified individual with a disability, by reason of that disability, being excluded from participation in or being denied the benefits of the services, programs or activities of a public entity, or being subjected to discrimination by any such entity . . . .

5 M.R.S.A. § 4592.[4]

**A. Defendant Gagne**

The complaint states that defendant Gagne is sued "in his official capacity" as "an agent of the State of Maine Judicial Branch." Complaint at 1, 3. Gagne offers several arguments to support his motion for summary judgment: (i) he is not a "public entity" or a "public accommodation" under any of the three applicable statutes; (ii) he is not an agent of the state judiciary; (iii) he is entitled to judicial immunity;[5] (iv) he did not discriminate against the plaintiff on the basis of his disability; (v) the plaintiff's action is barred by the Eleventh Amendment, and, if the ADA applies to the states, it is unconstitutional; and (vi) the plaintiff lacks standing to seek injunctive relief. Defendant Andre Gagne's Memorandum in Support of Motion for Summary Judgment ("Gagne Memorandum") (Docket No. 19) at 3-20. The plaintiff chooses to address only the second, fifth and sixth of these arguments. Plaintiff's Gagne Objection at 2-13.

The majority of courts that have addressed the issue has held that neither the Rehabilitation Act nor the ADA permits claims against persons in their individual capacities. *E.g.*, *Alsbrook v. City of Maumelle*, 184 F.3d 999, 1005 n.8 (8th Cir. 1999) (ADA); *Hiler v. Brown*, 177 F.3d 542, 546-47 (6th Cir. 1999) (Rehabilitation Act); *Hallett v. New York State Dep't of Correctional Servs.*, 109 F.

[4] The complaint also alleges violation of "specific regulations under 5 M.R.S.A., 94-348 Chapter 7, § 7.17," Complaint ¶ 56, an incomprehensible citation.

[5] The plaintiff's contention that Gagne "cannot have it both ways," by arguing first that as a bail commissioner he is not part of the judicial system and then that he is entitled to judicial immunity, Plaintiff's Objection to Defendant Andre Gagne's Motion for Summary Judgment ("Plaintiff's Gagne Objection") (Docket No. 33) at 2, ignores the longstanding practice in the American court system of (*continued on next page*)

Supp.2d 190, 199 (S.D. N.Y. 2000) (both); *Montez v. Romer*, 32 F. Supp.2d 1235, 1240-41 (D. Colo. 1999) (both). Presumably for this reason, the plaintiff asserts his claim against Gagne only in his official capacity.[6]

Gagne first argues that a bail commissioner cannot be a public entity because a bail commissioner does not come within the applicable statutory definitions of that term. He contends that he does not receive federal financial assistance, but that factual contention is not included in his statement of material facts and accordingly may not be considered by the court. He also contends that a bail commissioner is not an "instrumentality of a State" or a "place of public accommodation." Gagne Memorandum at 3-4. The plaintiff apparently believes that a bail commissioner is included within these definitions because his work is "judicial business." Plaintiff's Gagne Opposition at 3. It is not necessary to resolve this issue, for which neither party cites any authority in support, because, assuming that a bail commissioner is an agent of the Maine judiciary, he is entitled to judicial immunity in that capacity from the claims brought by the plaintiff.

Gagne contends that an individual is entitled to the protection of the doctrine of judicial immunity when the act in question is a judicial act. Judges are immune from claims for damages under the ADA that arise out of judicial acts. *E.g.*, *Badillo-Santiago v. Andreu-Garcia*, 70 F. Supp.2d 84, 91 (D. P.R. 1999); *Turgeon v. Brock*, 1994 WL 529919 (D. N.H. Sept. 29, 1994), at *2. The setting of bail is a judicial act. *Tucker v. Outwater*, 118 F.3d 930, 933 (2d Cir. 1997); *Edwards v. Hare*, 682 F. Supp. 1528, 1531 (D. Utah 1988) (justice of the peace). The same is true of claims under the Rehabilitation Act. *Pomerantz v. County of Los Angeles*, 674 F.2d 1288, 1291 (9th Cir. 1982) (jury administrator). Under Maine law, a bail commissioner is a judicial officer, 15 M.R.S.A. § 1003(8),

arguing in the alternative, which every party is entitled to do.

[6] Gagne does not contend that he may not be held liable in his official capacity. *See Hallett*, 109 F. Supp.2d at 199-200.

and is immune from any civil liability for acts performed within the scope of his or her duties, 15 M.R.S.A. § 1023(3). This immunity applies to claims under the MHRA as well.

Defendant Gagne is entitled to summary judgment on all claims brought against him.[7] *See* Recommended Decision on Defendants' Motions for Summary Judgment (Docket No. 36), *Levier v. Scarborough Police Dep't*, Civil Docket No. 00-54-P-H, *aff'd* December 11, 2000 (Docket No. 44), at 6-8. The plaintiff's motion for summary judgment on these claims must be denied.[8]

**B. Defendant Lewiston Police Department**

Lewiston makes three arguments in support of its motion for summary judgment with respect to the substance of the plaintiff's claims: that the plaintiff cannot establish a *prima facie* case, that an interpreter was not necessary for effective communication under the circumstances present at the plaintiff's residence and the Androscoggin County Jail on January 11, 1998, and that the plaintiff is not entitled to compensatory or punitive damages or injunctive relief. Defendant Lewiston Police Department's Motion for Summary Judgment, etc. ("Lewiston's Motion") (Docket No. 16) at 7-18.

[7] This conclusion makes it unnecessary to consider Gagne's arguments that the plaintiff's claims against him are barred by the Eleventh Amendment to the Constitution and that application of the ADA or the Rehabilitation Act to the states is unconstitutional. Gagne Memorandum at 10-19. Accordingly, the request of the United States in its memorandum submitted as *amicus curiae* that this court "hold in abeyance consideration of" the constitutional question until the Supreme Court issues a decision in *University of Alabama Bd. of Trustees v. Garrett*, 120 S.Ct. 1669 (2000) (granting *certiorari*), is moot. United States' Memorandum as *Amicus Curiae* in Opposition of [sic] Defendants' Motions for Summary Judgment ("Government's Memorandum") (Docket No. 58) at 2.

[8] Both defendants ask the court to strike the plaintiff's motion for partial summary judgment because, although it was filed with this court on the last possible day allowed for filing of dispositive motions by the governing scheduling order, Endorsement, Defendant Lewiston Police Department's Motion to Extend Discovery Deadline (Docket No. 12) at 4; Date stamp, Plaintiff's Motion for Partial Summary Judgment, etc. ("Plaintiff's Motion") (Docket No. 24), and although the certificate of service filed with the motion attests to service of that motion on these defendants by mail on that date, mailing only took place on the following day, and, in the case of defendant Gagne, attempted mailing without postage resulted in hand delivery two days after the motion deadline. Defendant Lewiston Police Department's Motion to Strike Plaintiff's Motion for Partial Summary Judgment, etc. (Docket No. 27) at 2-5; Defendant Andre Gagne's Motion to Strike Plaintiff's Motion for Partial Summary Judgment, etc. (Docket No. 29) at 1-2. Neither defendant requested additional time in which to respond to the motion due to the alleged delay in service. While the practice of the plaintiff's attorney in this regard cannot be condoned, and the explanation set forth in the attorney's responses to the motions, Plaintiff's Objection to Defendant Lewiston Police Department's Motion to Strike, etc. (Docket No. 39) at 2-3; Plaintiff's Objection to Defendant Andre Gagnon's Motion to Strike, etc. (Docket No. 41) at 2-3, does not provide an acceptable excuse and reflects a cavalier attitude toward the requirements of the rules, striking the motion appears to be an unnecessarily harsh sanction under the circumstances. The motions to strike are denied. Counsel for the plaintiff should not take this denial as an indication that similar conduct in the future will not result in the requested sanction, however.

The plaintiff contends that he is entitled to summary judgment because "the undisputed facts in the record demonstrate that the Department . . . fell far short of [its] obligations under Title II [of the ADA] in its dealings with Mr. Crocker," Plaintiff's Motion for Partial Summary Judgment, etc. ("Plaintiff's Motion") (Docket No. 24) at 8, and because the conduct that allegedly violated the ADA also violated the Rehabilitation Act and the MHRA, *id*. at 9-11, 12-13. Lewiston's first argument is dispositive.

The parties agree that the substantive standards for determining liability under the ADA, the Rehabilitation Act and the MHRA are the same and that case law interpreting either federal statute is applicable to all three. Lewiston's Motion at 8-9; Plaintiff's Motion at 10, 12. *See Parker v. Universidad de Puerto Rico*, 225 F.3d 1, 4 (1st Cir. 2000); *Ridge v. Cape Elizabeth Sch. Dep't*, 77 F. Supp.2d 149, 167 (D. Me. 1999). Accordingly, the following discussion addresses all three counts of the complaint.

In order to establish a claim of violation of Title II of the ADA, like that at issue here, a plaintiff must show

> (1) that he is a qualified individual with a disability; (2) that he was either excluded from participation in or denied the benefits of some public entity's services, programs or activities, or was otherwise discriminated against by the public entity; and (3) that such exclusion, denial of benefits or discrimination was by reason of the plaintiff's disability.

*Badillo-Santiago*, 70 F. Supp.2d at 89. For purposes of its motion, Lewiston does not contend that the plaintiff cannot meet the first element of this standard.

> To prove a violation of the Rehabilitation Act . . . a plaintiff must prove that: (1) she is a "handicapped individual"; (2) she is "otherwise qualified" for participation in the program; (3) the program receives "federal financial assistance"; and, (4) she was "denied the benefits of" or "subject to discrimination" under the program.

*Darian v. University of Massachusetts Boston*, 980 F. Supp. 77, 84-85 (D. Mass. 1997) (citations omitted). Again, Lewiston's argument is focused on only the last of these elements. For purposes of the Rehabilitation Act, the complaint alleges that each of the defendants is a "program." Complaint ¶ 27. The complaint does not identify the programs and services of which the plaintiff was allegedly denied the benefit or in which he was not allowed to participate, for purposes of his ADA claim. *Id*. ¶¶ 35-48. The plaintiff's memoranda submitted in connection with the motions for summary judgment do not clarify this point.

Federal courts have generally recognized two distinct types of disability discrimination claims arising out of arrests:

> The first is that police wrongly arrested someone with a disability because they misperceived the effects of that disability as criminal activity. The second is that, while police properly investigated and arrested a person with a disability for a crime unrelated to that disability, they failed to reasonably accommodate the person's disability in the course of investigation or arrest, causing the person to suffer greater injury or indignity in that process than other arrestees.

*Gohier v. Enright*, 186 F.3d 1216, 1220-21 (10th Cir. 1999) (citations omitted.) This court has some experience with both types, *see Jackson v. Inhabitants of the Town of Sanford*, 3 A.D. Cases 1366, 1994 WL 589617 (D. Me. Sept. 23, 1994), at *1, *6 (plaintiff arrested because of his disability); and *Barber v. Guay*, 910 F. Supp. 790, 796, 802 (D. Me. 1995) (plaintiff arrested in course of dispute with landlord and charged with theft alleged disability based on psychological and alcohol problems and use of excessive force in carrying out arrest), although it is not possible to tell from the opinion in the latter case whether the argument made here by Lewiston was made in that case. It is clear that the plaintiff's claims against Lewiston can only be of the second type, because the Lewiston police arrested the plaintiff on a charge of domestic violence assault based on York's statements.

Lewiston contends that an arrest is not a covered service, program or activity under the ADA and the Rehabilitation Act. The small number of federal courts that have considered this question in the context of the second type of arrest have differed somewhat in their conclusions. In *Borman v. Bartch*, 152 F.3d 907 (8th Cir. 1998), a paraplegic injured while being transported after his arrest alleged violations of the ADA and the Rehabilitation Act; the court held that "[t]ransportation of an arrestee to the station house is . . . a service of the police within the meaning of the ADA." *Id*. at 909, 912. In *Rosen v. Montgomery County Maryland*, 121 F.3d 154 (4th Cir. 1997), the hearing-impaired plaintiff was stopped for erratic driving, failed field sobriety tests, was arrested and was taken to the station house where he signed a consent form and was given a chemical test. *Id*. at 155-56. He brought claims under the ADA and the Rehabilitation Act alleging that the police made no attempt to communicate with him in writing and denied his requests for an interpreter and a TTY telephone so that he could call a lawyer. *Id*. at 156. The court held that a drunk driving arrest was not a program or activity of the defendant county, of which the police department involved was apparently an agency, and that arrests did not come "within the ADA's ambit." *Id*. at 157. In *Calloway v. Boro of Glassboro Dep't of Police*, 89 F. Supp.2d 543 (D. N.J. 2000), the deaf plaintiff brought claims under the ADA and the Rehabilitation Act after she was questioned at the police station, where she had gone to file a complaint for assault against her neighbor, about the neighbor's claim that the plaintiff had assaulted her. *Id*. at 547-48.[9] The police tried without success to locate a certified sign language interpreter to aid in the questioning and ultimately relied on an uncertified interpreter. *Id*. After the police's attempts to convey *Miranda* warnings through the interpreter proved unsuccessful, an attorney

[9] The district court in *Calloway* rejected *Rosen* on the grounds that the Fourth Circuit's decision was based on the lack of voluntariness on the part of the arrestee, *id*. at 556, a position that the New Jersey court finds to be incompatible with the Supreme Court's subsequent opinion in *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206 (1998), a case involving a prisoner's claim that he had been denied access to certain prison programs due to his medical condition. In fact, the *Rosen* court did not rely on such a rationale, but merely cited (using the signal "cf.") a previous decision so holding.

notified the officers that he represented the plaintiff and the plaintiff indicated that she no longer wished to speak with the officers without her attorney present. *Id*. at 548. The plaintiff was then arrested. *Id*. The court, noting that its holding was "limited to investigative questioning at the police station," held that the plaintiff had stated a cause of action under the ADA and the Rehabilitation Act. *Id*. at 556.

In *Hanson v. Sangamon County Sheriff's Dep't*, 991 F. Supp. 1059, 1061, 1063 (C.D. Ill. 1998), the deaf plaintiff alleged that he was denied the opportunity to post bond and to make a telephone call, unlike eight to ten others arrested at the same time. The court held that these allegations were sufficient to state a claim under the ADA and the Rehabilitation Act. *Id*. at 1063. In *Hainze v. Richards*, 207 F.3d 795 (5th Cir. 2000), the court held that a mentally ill plaintiff who had been shot by police as he walked toward them with a knife despite their orders to stop did not have a cause of action under the ADA, stating that "Title II does not apply to an officer's on-the street responses to reported disturbances or other similar incidents . . . prior to the officer's securing the scene and ensuring that there is no threat to human life." *Id*. at 797, 801. In *dicta*, the court observed that "[o]nce the area was secure and there was no threat to human safety, the . . . deputies would have been under a duty to reasonably accommodate Hainze's disability in handling and transporting him to a mental health facility." *Id*. at 802.

Finally, in *Patrice v. Murphy*, 43 F. Supp.2d 1156 (W.D. Wash. 1999), the deaf plaintiff alleged a violation of the ADA arising out of her arrest following the arrival of police at her home in response to her daughter's 911 call, made at the plaintiff's request, during a dispute between the plaintiff and her husband. *Id*. at 1157-58. The court held

> that an arrest is not the type of service, program, or activity from which a disabled person could be excluded or denied the benefits, although an ADA claim may exist where the claimant asserts that he has been arrested because of his disability (*i.e.*, he has been subjected to discrimination). In the case at

> hand, . . . plaintiff's claim is that defendants failed to make reasonable accommodation to allow plaintiff to enjoy the benefits of police services. Plaintiff's claim fails to state a viable cause of action under § 12132 of the ADA.

*Id*. at 1160. I find the *Patrice* court's reasoning to be persuasive. Particularly in the circumstances of this case, where Morin, the arresting officer to whom the plaintiff wanted to tell his side of the story, made the decision to arrest the plaintiff based solely on information provided by York, and the processing of that arrest and the plaintiff's release on bail required the exchange of a minimal amount of information and could be handled in a short period of time, *Calloway, Gorman* and *Hanson* are distinguishable. *Calloway*'s holding is limited to investigative questioning by the police, which did not take place in this case. In *Hanson*, the arrested plaintiff alleged that he was prevented from making a telephone call, an allegation absent from the complaint here, and not allowed to post bond, in contrast to the facts alleged here and, significantly, in contrast to the defendants' treatment of other nondisabled individuals arrested at the same time. In *Gorman*, the plaintiff sustained physical injuries. Here, the plaintiff has presented no evidence of any injury in his statement of material facts. He does allege in his complaint that his damages consisted of "emotional distress, and feelings of isolation, humiliation, anxiety and fear," Complaint ¶ 23, but makes no attempt to show how these feelings differed from those that would be experienced by a hearing person convinced that the charge upon which he was being arrested was without merit. *See Rosen*, 121 F.3d at 158 (humiliation and embarrassment are emotions experienced by almost every person arrested for drunk driving; no injury sufficient to invoke ADA's protection). Even if the allegation in the complaint had been supported by evidence in the summary judgment record, therefore, for all that appears the plaintiff would not be entitled to relief under the statutes he has invoked.[10] *See Levier*, Recommended Decision at 13-17.

[10] As the government itself notes, *Hainze* is distinguishable from the instant case on its facts, Government's Memorandum at 9, n.6, and in any event the quoted *dictum* is too conclusory and lacking in stated factual support to allow its application here as persuasive (*continued on next page*)

The plaintiff suggests no reason why his claims under the MHRA should be treated differently, and I am aware of none.

The plaintiff seeks summary judgment on his claim that Lewiston "failed to provide notice to Mr. Crocker of his rights under" the ADA, citing 28 C.F.R. §§ 35.106 and 35.163.[11] Plaintiff's Motion at 9. It is not clear how a failure to provide information about his rights under the ADA harmed the plaintiff, since he claims that his request for Watson was a request for a sign language interpreter, and he never contends that he was unaware of his rights under the ADA. *Id*. at 2, 9; Plaintiff's Objection to Defendant Lewiston Police Department's Motion for Summary Judgment (Docket No. 34) at 6-7. To support his necessarily-implied argument that the cited regulations provide plaintiffs with a private cause of action, the plaintiff cites only *Clarkson v. Coughlin*, 898 F. Supp. 1019 (S.D. N.Y. 1995), in which the court found that the defendant Department of Corrections had violated the regulations with respect to a class of deaf and hearing-impaired inmates, without any discussion of the question whether the regulations provide such a cause of action. *Id*. at 1044. My own research has located no reported case law addressing this question. It is not necessary in any event to resolve the issue due to the absence of any allegation of injury resulting from the alleged violation of these regulations. *See Adelman v. Dunmire*, 15 A.D.D. 196, 1996 WL 107853 (E.D. Pa. Mar. 12, 1996), at *4 (plaintiff alleging violation of 28 C.F.R. § 35.106 may be entitled to injunctive relief upon showing he has been adversely affected by violation). Lewiston is entitled to summary judgment on this claim.

---

authority.

[11] Section 35.106 provides: "A public entity shall make available to applicants, participants, beneficiaries, and other interested persons information regarding the provisions of this part and its applicability to the services, programs, or activities of the public entity, and make such information available to them in such manner as the head of the entity finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this part." Section 35.163 provides, in pertinent part: "(a) A public entity shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities."

## IV. Conclusion

For the foregoing reasons, I recommend that the defendants' motions for summary judgment be **GRANTED** and the plaintiff's motion for partial summary judgment be **DENIED**.

***NOTICE***

***A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.***

***Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.***

Date this 9th day of February, 2001.

David M. Cohen
United States Magistrate Judge

GEORGE CROCKER
plaintiff

JUDITH A. PLANO, ESQ.
[COR LD NTC]
DISABILITY RIGHTS CENTER
24 STONE STREET
P.O. BOX 2007
AUGUSTA, ME 04338-2007
207-626-2774

v.

LEWISTON POLICE DEPT
defendant

EDWARD R. BENJAMIN, JR.
[COR LD NTC]
THOMPSON & BOWIE
3 CANAL PLAZA
P.O. BOX 4630
PORTLAND, ME 04112
774-2500

ANDROSCOGGIN COUNTY SHERIFFS DEPT
defendant
[term 06/21/00]

MICHAEL J. SCHMIDT, ESQ.
[term 06/21/00]
[COR LD NTC]
WHEELER & AREY, P.A.

27 TEMPLE STREET
P. O. BOX 376
WATERVILLE, ME 04901
873-7771

DISTRICT COURT BAIL COMMISSSIONER FOR ANDROSCOGGIN COUNTY
defendant

PAUL STERN
[COR]
LEANNE ROBBIN, AAG
[COR LD NTC]
ASSISTANT ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, ME 04333
626-8800